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The Dynamic of Institutional Discrepancies and Growing Contradiction within the International Economic Order

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Theme I: Economy, Prosperity, and Social Justice

AN ARGUMENT FOR ALTERNATIVE GLOBALIZATION

Leopold Specht*

In this presentation I shall describe (i) a process of expanding the institutional frameworks of economic and social development that apply on a global scale principles found in the Anglo-American world; (ii) the reinterpretation of these institutional frameworks by ascribing to them a narrow – to a certain extent ideological – meaning which does not reflect the variety of meanings carried by those institutions in the Anglo-American world; and (iii) the undermining of sovereign decision-making by states in order to regulate economies and social systems in a manner that does not pose limitations to the expansion of the institutional framework as described above. This hegemonic programme of ‘globalization’ is at the heart of policies promoted by the United States and such international institutions as the International Monetary Fund (IMF) and the World Bank.

Here, I intend to focus on the limitations on state sovereignty, and make some suggestions concerning the institutional pillars to support an alternative programme of globalization. To advance my argument, it will be necessary to provide a description of the course along which the hegemonic programme of globalization is currently being achieved.

- 1 The understanding of economic and social development encapsulated in the hegemonic programme is crystallized around an image of markets which function according to a generalization of certain US experiences. Such an understanding implies a hierarchy of markets, with capital markets at the top and labour markets at the bottom. This view of markets focuses on a repertoire of instruments developed to facilitate market transactions in the Anglo-American context. In translating this image of markets and specific instruments of transactions into a programme operating on a global scale, economies are being reorganized according to a blueprint which aims at changing the system of decision-making in enterprises – through corporatization and privatization – and at imposing so-called hard budget constraints upon enterprises by strictly limiting the aggregate quantity of money available in a particular national economy.
- 2 The politics generated by this programme are anchored in a perception of its substance which is narrow in two ways. The hegemonic programme suggests a particular version of monetarist *laissez-faire* as inherent in its institutional programme, and also that this monetarist *laissez-faire* would be prevailing, generally, in Anglo-American economies (and not only during certain periods). And the

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potential of using the mechanisms evolving from the institutions, the hegemonic programme argues, is only limited to a monetarist and laissez-faire programme of economic policies.

The alternative view underlying the proposal advanced in this paper suggests that the institutional arrangements around which markets are being structured result in an (often) 'unruly pluralism' of apparently conflicting policies and, thus, in a multitude of contents and forms of such institutional arrangements. The alternative view furthermore argues that these institutional arrangements are capable of taking on many different and potentially indeterminate meanings.

The hegemonic programme of globalization advances its agenda by circumscribing the regulatory powers of states and of entities with legislative powers, such as the European Union.

These limitations usually operate on two levels. First, international institutions make their monetary support for states conditional, in most cases, on the implementation of policies which conform with the hegemonic programme. Second, global firms are ascribed rights which amount, in many circumstances, to (quasi) sovereignty. This 'normal' course of expanding the hegemonic programme of globalization owes its being to the power constellations in existence after the end of the Cold War. The cause of the demise of the Soviet bloc is interpreted as being attributed to the supremacy of a 'Western' system which is reduced – in its prevailing descriptions – to the ideological (mis-)representation of Anglo-American economic and social systems described above.

Furthermore, and increasingly often, the weight of US military power is used to support the hegemonic agenda. In doing so, the United States exploits its ability to impose a state of emergency on states and societies in any part of the world without having to contend with another sovereign power or being checked by the United Nations.

Most descriptions of the hegemonic programme of globalization note the limitations posed on state sovereignty. Accordingly, in a quasi-natural process, the power of states to regulate the economy and to intervene in the social arena is constantly being weakened. The curtailment of the powers traditionally perceived as falling within sovereignty (of states) are argued to be a main reason for the advancement of the hegemonic programme.

I suggest that the weakening of sovereignty is only one component to note when analyzing the impact of globalization on state sovereignty. Of similar importance, it seems to me, is a broadening of the concept of sovereignty; that is, the institutional framework of the hegemonic programme of globalization is transforming or redefining the concept of sovereignty as intended by the United States and its allies (the so-called 'international community'). States which do not subscribe to the hegemonic programme are viewed as a threat to the sovereignty of the members of this 'international community'.

Let me refer – as an example – to the so-called 'Interim Agreement for Peace and Self-Government in Kosovo' that contained the mandate to introduce a 'Western style market economy' in Yugoslavia. Initially, the relationship between the economic

programme and the dilution of sovereignty was camouflaged. It was obfuscated by a human rights discourse (Kosovo). Lately, this connection has increasingly been unveiled.

The prevailing view is that social systems that deviate from those promulgated by the hegemonic programme of globalization are perceived as a mounting threat to the members of a so-called 'international community' and to the international community itself. A particular economic and social order becomes a salient element affecting the sovereignty of states. And the drive for the imposition of such order on a global scale is viewed as part of the expansion of the sovereignty of the 'international community'.

This devolution transforming the hegemonic programme of globalization into a defining element of the sovereignty of certain states is noteworthy because it reveals the invisible hands which are busy crafting a new world order that reflects the inherent values of the hegemonic programme of globalization. In recognizing this shift in paradigm, the expansion of particular institutional arrangements ceases to be a quasi-natural phenomenon. To argue in favour of alternatives is, hence, not an exercise in futility.

Also, alternative social and political programmes find some cogency in the institutional arena if elevated to the level of reasoning about sovereignty. That is: if economic and social orders become generally recognized as defining elements in the exercise of sovereignty, interventions by states or international institutions in favour of one particular economic (social) order – against other ones – would be recognized as a violation of the sovereignty of the non-conforming state. In view of public international law currently in force, this statement seems to summarize prevailing wisdom. An analysis of the so-called IMF or World Bank conditionalities that a state must implement or undertake in order to implement within its national economy as a condition of any financial support (soft and hard loans, or grants) demonstrates the hegemonic programme (of globalization) abandoning the precepts of international law; which is even more apparent in the light of the unbridled, official rhetoric of the remaining superpower.

An alternative programme of globalization may use the traditional panoply of concepts found in the body of public international law as an instrument for arguing in favour of decisional and regulatory powers on the level of states and intergovernmental organizations (such as the EU). The reference to public international law requires, however, a review of its underlying institutional and doctrinal precepts. In this respect, I shall limit myself for the purposes of this presentation to referring, for example, to David Kennedy's account of the perpetual repositioning of the narrative on (state) power with continuously changing grammar and unaltered content. The primary positioning of doctrinal accounts described in his analysis – from the move of the secular to institutions, and from institutions to procedure – reconstitute previous dilemmas throughout the following stage of the narrative of international law. Kennedy's analysis of the shift within international law doctrine provides for sufficient instrumentation critically to view the institutional programmes proposed by the hegemony programme and also the alternative set forth below.

The alternative view on globalization, as proposed here, relies on and broadens the concept of 'functional antagonism' emerging from Nathaniel Berman's review of the notion of 'neutrality' in his account of the concepts of international law that dominated the debate during the period of the Spanish Civil War (1936–39). Berman describes a 'functional agnosticism' towards competing claims to sovereignty as a sophisticated doctrinal turn in the meaning of neutrality aimed at upholding world peace along the lines established by the League of Nations.

I shall borrow this concept of functional agnosticism to allude to an institutional framework for competing tenets of social development on a global scale.

To institutionalize competition and pluralism of programmes of social development on the largest possible scale is the core of the alternative programme. This programme suggests that the world needs to re-examine socially sustainable development encapsulated in the Bretton Woods system. It envisions institutional arenas providing for the amalgamation of competing visions of social and economic development and an unbiased allocation of resources for experimentation with such competing visions.

Let me briefly speak about the contents of the alternative programme and afterwards allude to the institutional framework within which to promote this alternative.

Social institutions as developed in the Anglo-American world and in the rich societies of the north Atlantic basin are potentially indeterminate as to their purpose and function. They assume particular meanings and take on such forms as are required by regulatory tasks in specific circumstances. The abstractions of a variety of meanings of institutional arrangements into the prevailing ones are therefore context-bound. The narratives on the development of social institutions are in most cases nothing but an *ex post facto* legitimization which justifies such developments. By way of example, let me refer to property rights. Robert Gordon's work on early modern concepts of property in the United States draws an instructive picture of the genesis of property rights as not being linear. He describes an extensive number of institutions with contradictory purposes, and, in many cases, the prevailing exceptions to the doctrines which are described as the origin of contemporary concepts of property rights.

The same can be claimed for other social institutions, in any given time and for all 'intern' societies. The design of a blueprint for social development on the basis of generalizations or even with reference to a given set of institutions in a particular society is, at best, an inaccurate description of such a society.

To solicit an 'unruly pluralism' (Robert Gordon) of meanings and forms of social development is the task of alternative globalization. This pluralism might encompass conflicting understandings of Western institutions. And it should extend over social institutions in societies which are not Western in terms of their genesis.

The most important aspiration of a programme aiming at soliciting the pluralism of form and content inherent in any given society is the trust in the process of continuous experimentation and the understanding that social problems are never resolved but are in a state of permanent 'resolution'. And, notably, it is built upon the trust in the ability of people to act in inspired ways.

The hegemonic view of globalization is supported by international institutions which promote 'globalization' of the kind described in the first part of my presentation. An institutional framework for the alternative programme of globalization must be 'functionally agnostic' with respect to the particular features of varying social and economic programmes (policies). It should allow for the promotion of different and distinctive programmes and for a continuous assessment of each programme. Crucially, an institutional framework developed as part of such alternative must be agnostic with respect to the particular institutions which constitute the framework itself.

A traditional understanding of sovereignty, conceptually enriched by the notion of 'functional antagonism', helps us to rethink the 'state' as one (of various) institutional framework(s) for promoting alternative models of globalization.

THE LEGAL REGULATION OF TRAFFICKING, MIGRATION AND TERRORISM: THE IMPACT ON CROSS-BORDER MOVEMENTS AND WOMEN'S RIGHTS

Ratna Kapur*

I raise three issues for discussion. The first issue is the way in which global economic processes have triggered a contemporary wave of migration, legal and illegal, and the international and domestic responses to this phenomenon. Second is the gender impact of anti-trafficking initiatives in the domestic and international arena, which have adversely affected women's economic choices, curtailed their rights to mobility, and produced a clandestine migrant-mobility regime. The third issue is the way in which recent legal responses to cross-border movements have been informed by the 'war on terror' and have converged with the discourse of the conservative right, building on xenophobia predating the terrorist attacks on the United States of 11 September 2001 to produce hostility towards, and fear of, the 'other', who seems to threaten the security of the nation.

The political and legal agenda that is currently being pursued in relation to cross-border movements is diametrically opposed to women's rights and to the rights of others who cross borders as migrants, refugees, or asylum-seekers. The contemporary legal interventions in the lives of the transnational 'subordinate subject' are being articulated primarily from the perspective of the host country and within the overarching concern for the security of the nation.

Nearly 150 million migrants cross borders in our world today – from rural towns to urban centres, from the periphery to the metropolis, from the global south to the global north. Evicted from their homelands by powerful forces of exclusion and disadvantage, a growing mass of floating migrants is squatting on global borderlands – searching for a new home, waiting to arrive. The residents of the global borderlands are non-nationals, non-citizens, and practically non-existent to those who reside in and manage the business and defence of homelands. This new breed of migrants is

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gendered. These crossings challenge our most basic notions of women's reproductive labour, family, community, nation, culture, and citizenship.

Globalization is invariably used to refer to the free flow of goods and capital, thought to be critical to the efficiency of the market and intrinsic to the globalization process. The market also triggers a global flow of labour, yet the free flow of labour is not addressed within the discourse of market management. It is addressed by initiatives dealing with trafficking, human smuggling, border controls, terrorism, and sexual morality.

Countries of origin and destination gain from migration, including clandestine migration. In the context of globalization, migrations do not just happen – they are produced. They are partly an outcome of the actions of governments' foreign policies and their economic involvement in migrants' countries of origin. Earlier colonial patterns also inform current migration patterns, captured in the slogan, 'We are here, because you were there'. In countries of destination, the demand for an abundant supply of low-wage labour and a shrinking supply of a local workforce sustains the economy of the global metropolises and produces migration. At the same time, cash remittances to countries of origin have registered phenomenal increases over recent years, often sustaining household, community, local, and national economies.

At the international level, cross-border movements have been addressed as 'trafficking' and 'smuggling'. This approach has had a particularly adverse impact on women, pushing them further into situations of violence and exploitation. At the domestic level, these movements have been addressed through appeals to assimilation and tests of fealty to the nation, as well as the criminal law and the 'othering' of the 'alien migrant', who fails to assimilate and continues to enter countries by illegal means.

While the avenues for regular, legal, and safe migration have decreased worldwide due to the restrictive migration and immigration policies of countries of transit and destination, this phenomenon has actually produced a growing market for clandestine migration services under the migrant-mobility regime. Irregular labour services, smuggling, facilitation of illegal migration, provision of false passports and visa permits, underground travel operations, trafficking, and other clandestine migration services are not an aberration or 'rogue' regime. They are produced by the legal order erected to address cross-border movements.

Half of nearly all migrants are women and girls, and many of these are migrating independently rather than as part of a family. Women's cross-border movements continue to be addressed primarily through anti-trafficking initiatives at the international, regional, and domestic level. Under these initiatives, a woman's consent is irrelevant and her subjectivity denied. She is addressed primarily as a victim, to be rescued, rehabilitated and repatriated. At times her consent is acknowledged only to implicate her in the discourses of immorality (for such migration is consistently and erroneously conflated with sex work) and criminality, to be penalized together with traffickers and terrorists for exposing the porosity of borders and the vulnerability of the nation-state. These responses do not engage with the premise that migration is a manifestation of globalization – that it is indeed globalization.

The movement of women is engendered by factors that render them amenable to migration and expose them to human rights violations: the insecurity of food and livelihood, the growing reliance of households on the earnings of women and girls, the erosion of social capital and the breakdown of traditional societies, the transnationalization of women's labour in sectors which do not comply with labour or human rights standards and often rely on exploitative labour, forced labour, and slavery-like practices. Women's migration is rendered vulnerable by assumptions about gender and sexuality: the assumption that women's primary work is in the home, underscored by the sexual division of labour. Trafficking regulations, like border controls relying on deportation or incarceration, ignore the economic engine that drives transborder female migration. Instead, women migrants become more attractive when their status is illegal, and their social and economic options and demands are constrained.

The choice of women to move in response to these push and pull factors is not facilitated or protected by international legal mechanisms. Instead, women's migration is treated as sex work and trafficking. The trafficking in women and girls is routinely conflated with their sale and forced consignment to brothels in the sex industry. Equating migration with trafficking leads to simplistic and unrealistic solutions focused on preventing those who are deemed vulnerable from migrating. This reinforces the gender stereotype that women and girls need constant male or state protection from harm, and must not be allowed to exercise their own right to movement or to earn a living in the manner they choose. This logic has resulted in viewing all consensual migrant females as trafficked. Further, curbing migration drives the activity further underground, pushing the victims further into situations of violence and abuse.

The choice of women to cross borders needs to be viewed within the context of empowerment and their search for better economic market opportunities. Their consent must be located in the matrix of the global economy, market demand, and cross-border migrations. The international legal order should facilitate women's freedom of mobility and safe migration, especially, though not exclusively, from the south to the north. Instead, her consensual movement is rendered illegal, through the foregrounding of the security of the nation-state, the conservative sexual morality that informs anti-trafficking laws, and the xenophobic responses to global movements that increasingly inform immigration laws. These legislative measures are *de facto* partners with the parallel 'underground migrant-mobility regime', where travel agents and transporters, complete with route maps, directions, and a list of the most vulnerable points of entry, negotiate how their human cargo will cross borders, avoiding apprehension by state agents and border patrols.

The problems have been made worse by the new global war on terror. We are witnessing a heightened anxiety about the 'other', perceived as a threat to the security of the nation. The boundary line of difference is being redrawn along very stark divides – between friend and enemy, those who are good and those who are evil. The 'alien migrant' has become one of the primary targets and casualties of the failure to define either the purpose or limits of the 'war on terrorism'.

This new war has created space for a more strident and alarming response to the global movements of people. Because the smugglers offer travel services to illegal migrants, they easily fall within the category of transnational organized crime, criminals, and potential terrorists. At the very worst they are terrorists and at best they are criminals who have sought to cross the border illegally. The conflation of the migrant with the terrorist is not new, but it has received greater attention since 11 September.

The space for the migrant is being eroded through the discourses of trafficking and terrorism. Both justify initiatives designed to keep the 'Rest' away from the 'West'. The security of the alien migrant may be less threatened by people smugglers than by the international system of protection offered to people who move as migrants, refugees, or asylum-seekers.

The legal interventions in the lives of the alien migrant have been articulated primarily from the perspective of the host country. Subordinate voices are omitted from these conversations, yet only these voices can untangle the conflations and confusions between trafficking, migration, and terrorism. The voice of the subordinate needs to be foregrounded – not as a terrorist, nor as a victim, but as a complex subject who is affected by global processes, and seeking safe passage across borders.

The agency of women also needs to be foregrounded. Her choice to move must be distinguished from other situations where her consent is absent or her movement is compelled by strife or conflict. Regardless of why women move, their assertion of the right to mobility, self-determination, and development must not be confused with the violence, force, coercion, abuse, or fraud that may take place in the course of migration or travel. The crime rests in the abuse and violations committed against women along the continuum of women's migration and not because of the movement or mobility per se.

In order to address the issue of cross-border movements, we cannot simply remain confined to the domestic arena, where regulatory enforcement is focused on the individual and the border. Nor can this process be addressed in the international legal arena purely in terms of criminality or trafficking. Transnational movements require a transnational response and analysis – they cannot be caught within older frameworks.

We should modify immigration laws to accommodate their transnational reality, expanding immigration laws that acknowledge and facilitate the entry of people other than those who are part of the information technology, highly skilled work force, or economic migrants with a big bank balance.

At the same time, by virtue of her subordinate status, the transnational subject also brings a normative challenge – to the porosity of national borders and the emergence of non-state entities as a significant force in the international arena. The liberal state and the liberal subject are based on the idea of fixed borders, with clearly identifiable interests and identities. The complexity of new global formations and the dynamic character of the individual who crosses borders challenge the notion that the state and individual are hermetically sealed from one another and breaks down the binaries – the us and them, here and there distinctions – and enables us to

recognize how these oppositions are produced and made to seem natural through historical power relationships.

THE ECONOMIC IDEOLOGY OF HUMAN RIGHTS

Balakrishnan Rajagopal*

My remarks are drawn from work I have done recently on the jurisprudence of second- and third-generation human rights in international courts and the relationship between globalization, development, and standards (human rights, environmental and labour) in specific industrial sectors. I criticise the economic ideology of human rights discourse deployed in the context of globalization. The issue of social justice is framed as a matter of human rights, I want to make us more cautious about using this frame.

The 1999 US State Department report on human rights identified human rights along with money and the Internet as a universal language of globalization. The implication was clearly that the relationship between rights and economic globalization is positive. Other groups think that the relationship between rights and globalization is negative. Many developing countries think that globalization should in fact come ahead of basic human rights, including labour rights. Many non-state actors and social movements see globalization as undercutting human rights.

The position that rights and globalization are positively correlated rests on an emasculated and market-friendly concept of human rights that actually does not include economic, social, and cultural rights. This stripped-down version of human rights continues to be the mainstream view, at least in the United States. Such a human rights theory would not question any social arrangement that results from the 'impartial' operation of the market, judged to be either, as the economists say, Pareto-optimal or in conformity with the so called Kaldor-Hicks compensation principle.

Developing states that place development before human rights in fact share the assumptions of neo-classical economic theory and see globalization and human rights as incompatible. We can see this in the debate over labour rights, even regarding the labour standards that have been included in the 1998 principles of the International Labour Organization (ILO). Leading trade economists argue that different labour standards constitute a source of comparative advantage. These economists recognize that economic competition under the assumptions of neo-classical economic theory, including insatiable and ever rising consumption or the idea of scarcity, would lead to losers also. But the idea here is that as long as the losers could in theory be compensated, the economic competition is beneficial or efficient. But in reality, as we all know, in the international legal order particularly, there is no mechanism for offering any compensation to losers.

In trade, for example, it is recognized that there will be losers, but the way in which it is justified is according to the Kaldor-Hicks principle, while international trade law does not have any mechanism for ensuring compensation. Even at the micro-level

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within countries, in the decision to build a dam for example, it is recognized that there will be losers and it is justified according to the compensation principle. But in fact, most of the losers, which include the poorest and most vulnerable, are not compensated.

But, more importantly, developing states believe that the losers could be taken care of not through a principle of compensation that is integrated into economic decision-making through market decisions, but through something external called *development*, and not through, for example, legally entrenched economic and social rights to land, housing, or education. But designating development as the sole way of taking care of losers reduces the issue of social justice to one of *state capacity*. It becomes a question of whether, for example, the Ministry of Urban Development has the capacity to engage in slum redevelopment to deal with a housing crisis. So it is a very narrow approach to social justice that emerges from the critique of developing countries.

The third group – social movements and non-state actors – seem to have a broader description of human rights that includes economic, social, and cultural rights relating to, for example, land, cultural autonomy, housing, or livelihood for survival. This is true in movements ranging from Brazil to India to Thailand that I have researched. And this expanded conception also coincides with emerging trends in international human rights law, including emerging practice even by leading non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch, as well as the UN Commission on Human Rights and the Sub-Commission towards a more expansive notion of human rights.

Recently there have been some ‘insurgent’ judgements, marginal to the mainstream, that show a richer, more nuanced understanding of economic, social and cultural rights. Judge Weeramantry’s concurring opinion in *Hungary v. Slovakia* blazes a new trail by re-articulating the legal basis for the principle of sustainable development in international law to connect the environment, human rights, and cultural survival. A recent judgement by the South African constitutional court, *Grootboom v. Government of South Africa*, involving housing rights, is also very promising. Such cases take the idea of economic, social, and cultural rights more seriously.

What do all these judgements show? They show that the equation of social justice and human rights is a work in progress, grounded in the politics of struggle by social movements. To assure prosperity with social justice, the notion of prosperity must itself be critically examined and a broader human rights theory should be formulated that reflects how the most vulnerable actually use human rights.

THE DYNAMIC OF INSTITUTIONAL DISCREPANCIES AND GROWING CONTRADICTION WITHIN THE INTERNATIONAL ECONOMIC ORDER

Chantal Thomas*

I want to focus on discrepancies in institutional capacity within the international legal order, and the growing contradiction within the international economic order

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between a dynamic of liberalization and a dynamic of prohibitionism. Following on from Professor Rotter's discussion of lawmaking, and the idea that lawmaking follows the normative identity of lawmakers, it is important to look into the actual process of decision-making, where we can see the traces of inequalities that continue to plague the international legal order. One example is the very severe discrepancies in institutional capacity between the developed and developing states. So this is not an ideological or normative issue. It is a very concrete question of who actually gets to sit around the table and who has a level of capacity that makes their participation a valuable one. If one goes to the offices of the World Trade Organization in Geneva, one discovers that the actual plenary rooms are too small for the 146 states that are now WTO members, and the reason for that is that only a sub-portion of the member states actually are able to sit in plenary discussions on an ongoing basis, only a sub-portion of the full membership of the WTO can afford permanent representation in Geneva and can afford to have even one representative in plenary discussions. This disables developing states from participating effectively in the process of shaping international legal norms. This is happening as we speak in the negotiations for the World Trade Organization following Doha. There is a call for an early harvest of concessions in the WTO on services, on agriculture, and on a number of other fronts, and a number of developing governments are pressured to concede without even having the opportunity to read the documents in their own languages – or without even having the opportunity to read documents at all. In the wake of the events of 11 September 2001 there is a lot of pressure on developing states to agree to norms which they have very little ability to participate in generating.

Efforts to address the problem of institutional capacity are inadequate. The WTO's technical assistance function brings in people for a couple of weeks for seminars on very basic elements of trade law, most-favoured-nation principle, and so on, but does not enable governments to identify what their interests would be in concrete negotiating situations. We also see a discrepancy in institutional capacity between the political bodies and the judicial bodies. Within the WTO the judicialization of international trade law has the effect of constraining the politically negotiated intentions behind a standard, so that even when there is some recognition of the importance of development, for example within the negotiations, it often becomes limited in the process of actually applying the law. For example, in the bananas case, the European Community was able to negotiate a waiver of Article 1 of the General Agreement on Tariffs and Trade (GATT) to enable the continuation of its performance scheme for developing nations. In the judicial dispute, the waiver was read very narrowly, despite the intent.

There is also a significant discrepancy in institutional capacity between 'hard' law and 'soft' law. In the negotiations at the Johannesburg Summit on Sustainable Development, for example, the United States, Canada, Australia, New Zealand and Japan argued for a hierarchy of norms, whereby the WTO would trump any attempt by the EU or the developing states to negotiate a norm of, for example, environmental conservation or development. Such concrete institutional discrepancies elevate a very formal and narrow interpretation of trade over and above other competing concerns.

The other issue I want to address is the contradiction between the norm of liberation on the one hand and the increase of prohibitionism on the other. It is very clear that the dynamics of globalization enable both legal trade and illegal trade. First, improvements in technology and communication that generate the possibility of multinational production of cars and sports shoes also enable the multinational production and creation of heroin, of cocaine, of illegal migrants, and so on. There is no economic difference between legal aspects of the economy and illegal aspects of the economy on this score: they are equally enabled by technological developments that have generated globalization. Second, as trade agreements have streamlined the process of international trade in legal sectors, they have also streamlined trade in illegal sectors. Smuggling of illegal products such as narcotics or illegal migrants in containers that are themselves legally crossing borders as the result of trade liberalization is easier. Globalization also produces illegal trade. Agricultural imports displace domestic production. Clearly one result of generating a surplus of labour is going to be an increase in migration pressures. So there is a very intimate interconnection between legal trade on the one hand and illegal trade on the other, but of course there is a contradiction in the way that these elements or aspects of the economy are regulated, a contradiction between the norm of liberalization on the one hand and an increasing attention to criminalization on the other. The criminalization of illegal products is a criminalization of illegal persons. This is a very problematic dynamic. Criminalization does nothing to stop the flow of illegal products and services – if anything it makes the flow more lucrative by imposing a black market premium on these sectors. At the same time it provides a justification for repression, domination, and control of certain producers and certain persons that itself tends to perpetuate global inequality.

SOCIAL RIGHTS IN A GLOBAL ECONOMY

David M. Trubek*

The topic of my talk is the changing relationship between national law, social rights, and the international order. I shall focus on the protection of workers' rights and the promotion of labour standards, but the analysis can be applied more generally to other social and economic rights. The traditional approach has been to employ national law to protect workers' rights and improve labour standards, through labour law and collective bargaining. Both are normally regulated through national laws.

While actual regulatory processes have always been carried out at the national level or through private bargaining that is supervised and enforced by national authorities, there is a long tradition of international action in the field of workers' rights and labour standards. Two moments deserve special note: the formation of the International Labour Organization (ILO) and the creation of the Bretton Woods System in the aftermath of the Second World War.

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In both cases the primary focus of international activity was to buttress national regulatory systems. The ILO sought to define workers' rights with precision and to create international labour standards. But the ILO system leaves the nation-states with the primary, indeed almost the exclusive, responsibility for the protection of these rights. Similarly, the postwar system of 'embedded liberalism' created by Bretton Woods was explicitly designed to give nations leeway to develop strong industrial relations systems and welfare states. The Bretton Woods system said little specifically about workers' rights, but its architects thought that if the rules were followed those nations wanting to protect such rights would not be undermined by world economic pressures.

The result was a governance system which relied on national regulation but ensured a supportive international environment for nations choosing to build strong systems of industrial relations. In the twentieth century, the system, while far from perfect, worked fairly well for some countries. It facilitated the creation of effective unions, allowed nations to promote some degree of equality, and made it possible to promote reasonable working conditions at least in the rich countries of the North. While the system was much less effective in the developing world, it did have some effect even for poorer nations. And although the system worked reasonably well in richer countries where support for worker's rights were strong, even in those countries rights were not always implemented effectively and international standards could easily be ignored. In recent years the system has proved to be completely inadequate to the task at hand. It no longer works that well in the North, and continues to be limited in the South.

There is no question that globalization is a factor in the unravelling of the postwar system, which in the last analysis relied on the capacity of the nation-state to implement workers' rights. But globalization can weaken the regulatory capacity of the nation-state. Because capital is more mobile, countries may find it harder to raise standards when companies threaten to move to locations where standards are lower. For the same reason, it is harder to impose taxes needed to fund social protection systems. The globalization of production creates new problems, since the ensuing commodity chains cut across national borders.

The result may be a governance gap in which national law cannot be fully effective and international action, which was designed solely to strengthen national legal systems, is inadequate to fill the resulting void. Globalization has undermined many of the protections against global shocks that were set up in the postwar period. There is no international body with regulatory power capable of replacing national law.

While for some the solution is to roll back globalization, most recognize that this is unlikely to happen. Moreover, efforts to reduce international economic integration in the name of social justice could harm the very interests whose protection is being sought. If globalization is to be compatible with the protection of workers' rights, some way must be found to fill the governance gap. To do that, we must forge a new approach to global governance based on a new vision of the relationship between national law and international regimes.

It is easier, however, to see that a new approach is needed than to say what it might look like. And it is easier to see what will not work than to say what might prove to be an effective strategy to fill the gap I have described. One thing is relatively clear: simple models, taken from the history of federal systems such as the United States, are not the solution. The US solution was simple: we moved the regulation of legal matters from the state to the federal level, creating an effective national labour law.

This model is not available to the world community, and were it available, it could well be undesirable. There is no institution at global level remotely qualified to take this on. There is also reason to believe that any effort to create a comprehensive global system of mandatory labour norms enforced by a central organization would be a bad idea even if it could be accomplished. Workers' rights and the methods of enforcing them are deeply embedded in national systems, and there is great diversity in the paths nations have chosen and the instruments they have selected to deal with these issues. The changes in the world brought about by globalization have occurred so rapidly, and the situation remains so volatile, that it is hard to know what issues should be addressed at global level. Because of the novelty of the issues, the diversity of the institutions, and the volatility of the situation, we lack knowledge of how to proceed.

Even at the regional level, there is no easy path to follow. The European Union (EU) has evolved a very complex approach that eschews primary reliance on a central legal code or regulatory body. EU rules deal only with a limited number of areas: the free movement of workers, health and safety, worker participation, and job discrimination. The rules are largely implemented through national statutes and regulations and are enforced by national authorities. Many key areas of workers' rights, including freedom of association, and many dimensions of labour standards, including remuneration, are left to the exclusive jurisdiction of the EU member states.

The most recent EU foray into the labour areas is called the European Employment Strategy or 'EES'. This process, dubbed an 'open method of co-ordination', avoids central legislation altogether. Instead, the EES seeks to identify a number of major goals related to the elimination of unemployment which are shared by all the EU countries, but leaves the choice of means and implementation to each state while requiring that they exchange experiences and engage in multilateral surveillance of each other's efforts. This system encourages each country to seek its own solution in the light of everyone's experience. A key feature of the EES system is the use of guidelines, targets, indicators, and benchmarking.

Nevertheless, the EU system lacks a set of justiciable social rights at the European level. There are two overlapping sets of social rights that affect the EU's 15 member states. The first are the provisions of the European Social Charter, in force since 1965, which is administered by the Council of Europe and which covers all the EU countries and other European countries as well. The second is the recently promulgated EU Charter of Fundamental Rights (2000). The Social Charter is enforced through a system of reporting and monitoring. The Charter of Fundamental Rights has no explicit enforcement mechanism.

Summing up, the EU system encourages problem-solving through decentralization and experimentation, but makes each country accountable to the others for results. It also knits together all levels, from the supra-national to the local. It engages private actors as well as governments, even to the degree of bringing unions into the lawmaking process itself. The EU governance system does not rely exclusively on legal regulations. Rather, it employs a wide variety of tools that include not only formal legislation but also statements of principle, declarations of rights, non-binding guidelines, common indicators, benchmarking, and multilateral surveillance. The EU has created a multi-level system that provides for decentralization and flexibility but co-ordinates the activities of the member states and creates strong pressures on all the states to seek the best path towards common goals.

What lessons can we take from the European system for a new international architecture for social rights? Clearly, what works in Europe, with its long history of workers' rights at the national level, strong unions, dense systems of labour management, and democratic political systems, cannot automatically be transferred to other parts of the world. Further, no one would pretend that the EU system is perfect: Thus, some think that the lack of justiciable social rights at the EU level is a serious flaw. Nonetheless, there are lessons to be learned that would apply to Latin America and other parts of the world. The European case clearly suggests that simple models, drawn from domestic law or even from strong federal systems such as the United States and Brazil, are not necessarily the only answer to the challenge. It shows us that new forms of governance are available. The European case offers some concrete lessons. The creation of a unified market requires attention to social as well as economic issues. Highly specific and uniform rules enforced by a strong central regulatory agency are inappropriate for the complex task of enforcing workers' rights, even at regional level. It is possible to combine decentralized experimentation and national diversity with centralized monitoring, co-ordination, and collective pressure for progressive change. Common indicators and benchmarking can play a role in ensuring progress towards commonly accepted goals. Regional co-operation demands the close integration of national and regional levels of government in the evolution of objectives, guidelines, targets, and action plans. It is essential that social partners and civil society participate at regional and national level in the development of guidelines, assessment of performance, and pressure for improvement. I believe these lessons will be of value for people in the Americas and other parts of the world as they seek to develop an architecture for the protection of workers' rights and other social rights in the face of globalization.

GROUP I DISCUSSION

Erwin Lanc. I refer to Specht's last sentences and I quote: 'An institutional framework for the alternative programme of globalization must be "functionally agnostic" with respect to the particular features of varying social and economic programmes (policies). It should allow for the promotion of different and distinctive programmes and for a continuous assessment of each programme. Crucially, an institutional framework developed as part of such an alternative must be agnostic with respect

to the particular institutions which constitute the framework itself.' My question is: how should this gathering function? Will it be a meeting of the powerless to get power – how do you think about that?

Norman Birnbaum. I have a question: to what extent is the entire working population or very nearly the entire working population of the northern hemisphere, of the advanced capitalist countries with their higher standards of living, a kind of global labour aristocracy, whose interests through political as well as ideological, economic, and cultural developments are more anchored to the interests of their own property-owning and managerial elites than to some abstract notion of solidarity? I know that is contradicted by the ideology and by the political behaviour of some of the Western trade unions. John Sweeny, the president of the American Trade Union Confederation, AFL-CIO, was at both Seattle and Genoa. Nonetheless, the problems of mobilization at the base and of international solidarity remain and are problems worthy of our attention because they do deal with the political potential of any movement of this kind.

Manfred Rotter. Maybe we would gain in clarity if we distinguished between sovereignty as a legal term and autonomy as a social scientific term. I think dealing with the actual capacity of a state or a government, as Ms Thomas said, is one thing, and quite another is dealing with sovereignty as one of the component elements of the international legal system. That brings me to Ms Kapur. If I got you right, it was your thesis to say that we should somehow change the concept of international borders. Very well: but we should keep in mind that borders do not only have the function attributed to them in international law, of being the membrane, distinguishing between the public power of two states, to separate the public authority of two states; borders also entail a social and an economic dimension and it is the borders that limit the territorial dimension of the redistribution of wealth. So the point is: if we jeopardize the function of borders in the economic sense of the word we will have problems. Weakening the economic power of the 'haves' cannot be the real aim of enhancing the possibilities of the 'have-nots', if I may say so. This is to say that the formal system also provides security to the have-nots. The so-called *Lotus* principle is also a protection for the weaker. This is an aspect that we should not forget.

Max Schmidt. I have also questions to Dr Specht and Professor Thomas. The first is: what is your opinion about the future role of the economic and social task of the United Nations? Do you see any future in this direction? And more in detail: what do you think about the role of the Economic and Social Council as a forum for developing countries to play a more efficient role?

Günter Frankenberg. As I am not an international law scholar I prefer to step back from the current debate. My observation: there seem to be two dominant models of the relationship between international law and politics, which were both represented today. The first is based on the assumption that politics dominate law, which has a renaissance in the post-11 September United States. The second model invokes the *genius loci*, Hans Kelsen, and holds that law dominates politics. I interpret Professor Rotter in this sense – if I have misunderstood him, I hope it is a creative misunderstanding. I understood the papers this morning to say that

they tried to come to grips with a third model which would be characterized by an uneasy relationship between law and politics of reciprocal control. I think the legal domination model seems to be in trouble because of a reinvention of imperial laws as politics. First, it has grown to be strictly hegemonic – not only recently – and it is unilaterally dominated by empire number one, the United States. It seems to be guided by the imperative of security to an extent that all other normative concerns, which would have to be included to make it at least acceptable to a broader community of nations, have been relativized, if not extinguished. Today the system of concepts seems to be in disarray. We no longer have to deal with a couple of principles we can easily order in a hierarchical fashion or balance certain factors to reach results that could make us happy or not. I heard you talk about legal hybridity, which seems to be a fitting metaphor. This uneasy coexistence of law and politics seems to be more promising than any of the other models.

Friedrich Kratochwil. I wonder whether not the liberal project per se, but rather *the limits* of the liberal project have come to the fore in these discussions. For example: the paper on migration seems to suggest that the greatest possible freedom for the individual – which is only now extended from males to females – is progressive. Although I am very sympathetic to arguments attacking the paternalistic state and its alleged protective function, which is mostly used to keep others ‘out’, the espoused position does not seem to consider all the social ramifications of such a policy, which consists of the absolute subordination of questions of the social order to questions of individual preference. Similarly, Professor Thomas talks about the paradox or the contradiction of liberalization and what she calls an increasing ‘regime of prohibition’. It is a paradox only on the most superficial level, because everybody knows that the more you liberalize something the more you have to regulate that area, or you are likely to have social consequences which are disastrous. For example, Latin American states had to find out that you needed a very strong state in order to liberalize the market. Finally, Dr Specht’s argument has particularly emphasized a point made by Mr Lanc’s reading of the crucial passage. It reinforces Mr Rajagopal’s argument which to me sounded a bit like the claim of the primacy of the right over that of the good. But such a stance raises exactly and perhaps most sharply the question of the limits of the liberal project. While it might be prudent not to have too much packed into a proposal when one engages with other people with other political projects, the primacy of the right over the good, and the necessary agnosticism as to ultimate goals that go with this position, it is nevertheless a *substantive political* ideal, identified with the liberal project, not simply a neutral procedural yardstick. I might not have anything against this particular project, I might even adhere to it, but it needs further justification.

Thomas. I am happy to go first. On the paradoxical relationship between liberalization and prohibitionism, we must look at the way in which the state is involved in enabling or legalizing trade and compare that to the way in which the state is involved in criminalizing. The state is involved on both sides, and I do not suggest that the state was withdrawing from the process of liberalization. Rather, I think it is important to focus on the differences between the kind of state intervention that one sees within the project of liberalization and the kind of state intervention

that one sees within the project of prohibitionism. Professor Kapur identified migration as integral to international trade and yet at the same time it is portrayed as a problem that is separate and apart from the global economy. And yet if we look at it analytically, the impulses that lead to migration are part of the dynamics of the global economy.

Kapur. I want to proceed from what Professor Thomas has said. As to the idea that it is for the protection of the 'have nots', if that were the case, it should then lead to other initiatives that states could adopt, such as decriminalizing sex work or providing rights and benefits to migrants and migrant workers' families or ratifying a convention on migrant workers' families as well. But clearly that is not the case. Instead, they criminalize or victimize the migrant. I want to reiterate what Professor Frankenberg said, that the big challenges now are how to accommodate these transnational movements and this transnational phenomenon without resorting to the rigid notions of borders and nation-states, or protecting some nation-states' borders while in fact aggravating problems relating to the borders of other nation-states.

Specht. I would not talk about autonomy, but about sovereignty. We are now able to witness an attack on the sovereignty of one state and the attitude of an alliance brought about by this attack, which leads to a broad intrusion by this one state for reasons other than the protection of sovereignty. I am sure that our Russian friends here can tell us a lot about the oil routes around Russia or through Russia, and what difference it makes that US troops or the so-called allied troops of the International Community are now legally authorized to operate out of Uzbekistan. Look at the IMF or World Bank conditionalities for loans or interventions and then try to explain to me again the difference between autonomy and sovereignty.

Of course, it is very ambitious to think of a 'new' Bretton Woods, but I would be content merely with some steps in this direction. Some examples: first comes a change of discourse. As a practical lawyer I can tell you that in many parts of the world 'corporation' means 'US corporation' and if you want to explain that there are other legal orders which have developed much earlier than the US idea of corporation then you are not going to be heard. Or take barter, a significant aspect of trade between the less developed countries (LDCs). It is presented to us as only a problem resulting from the inefficiency of state-owned enterprises. I think this is laughable. But this power to interpret reality had huge bearings on the way in which international institutions have behaved and dealt with the needs of developing – whatever this means – social and economic realities in parts of the world.

Deborah Cass. Dr Specht, how different are the outcomes of an 'unruly pluralism' or a 'new paradigm' and our more familiar regimes? In the trade system, some liberal theorists rely on concepts which could be seen as being very open – for example, John Jackson has spoken about trade operating as an 'interface'. It is a very functionally agnostic concept. Jackson describes it as making a world open to diverse values both political and cultural. Other writers, Francis Schneider or Teubner, for example, promote a global liberal pluralism. So there are lots of routes towards something that seems to be alternative. Sure, stand up and say that the conventional routes do not really want more openness. Your particular route may end up in the same place.

I mean, it is not as if a conventional liberal author gets up every morning and says, we want to restrict economic possibilities only to the First World. They genuinely believe that an open interface trading system would create opportunities for others. I have great sympathy with wanting to recognize different forms and contents of social organization, and I think that is true of most people around the table, but we may need to be able to work out how that differs from existing mechanisms.

David Kennedy. This panel puts us in front of a difficult question. There is a conventional European social democratic response to the problems of unilateralism in politics and neo-liberal globalization and economics. It is a familiar and well-trodden response, with a deep history. All of the papers from the panel this morning seem to me to be asking whether that response is enough and whether that response is even a good idea.

The conventional European social democratic response in the domain of economics arises out of a social tradition. It advocates a chastening of neo-liberalism, which would harness it to human rights and be attentive to market failures, which serve as justifications for intervention by some state apparatus. The conventional response by social democrats in Europe accepts the efficiency frame for the economic analysis of policy, but supposes that market failures are more common than others suspect, so that the opportunities for intervention are more numerous. There is no attention to the multiple possible efficient markets, or to their quite different distributional effects – nor is there much attention to mobilizing resources for growth and development. In the domain of politics the conventional social democratic response to the problems of unilateralism are multilateral legal institutions and a rejuvenated global civil society. Both are seen as responses to the loss of political capacities in nation-states, but neither is imagined as the site of an engaged or vibrant politics which could challenge existing institutional arrangements in any significant way. They are sites for symbolic acts of humanization and complaint against the existing arrangements, but not for their contestation. And in the domain of law, the conventional European social democratic response to unilateralism has been an invigorated attention to human rights and humanitarianism. Each of these traditional sources of energy for the left was drawn into question by the papers on the panel. Yet each one of the papers also drew on those traditions in trying to develop an alternative. I want to try to sharpen our discussion of the limits of this traditional European social democratic alternative and how it is that we want to resurrect pieces of it.

Professor Kapur's paper suggested that the anti-trafficking movement, which is conventionally understood as the humane and left position, has tried to strengthen international human rights norms to protect the position of women. But migrants encounter new difficulties as a result. Professor Kapur emphasized that this effort to humanize the international migration system is not enough, but is rather part of the problem. This is a challenging argument, and I think it is not surprising that we keep coming back to that example and asking for more clarification. It picks up on something Professor Thomas said in identifying the unacknowledged repressive corollary to traditional social democratic ideas. The development of a labour aristocracy, identified by Professor Birnbaum with efforts to solidify borders and to create a repressive apparatus to maintain them, or in Professor Thomas's

terms with the effort to demonize certain forms of trade as the sorry underbelly of the liberalization effort – these were parallel examples of a traditional European social democratic response to globalization run amok. It also struck me in Professor Rajagopal's presentation on economic and social rights that this has been the United Nations' major response to globalization as well. As I understood Professor Rajagopal, not only are they not enough, but as they are being applied they are part of the problem, not part of the solution. He emphasized quite clearly that human rights are not sufficient to chasten economic globalization, and we on the left should refuse the temptation to place our hopes there. We should also refuse to confine our interests in distribution within the current vocabulary of development – and in particular the subset of that vocabulary associated with economic and social rights. Doing so, if I read Professor Rajagopal correctly, would be to overlook opportunities to humanize the market itself in its fundamental institutions.

Taken together, these papers seem to me to present an extremely strong challenge to conventional European social democratic thinking about globalization, both economically and politically. I would like to ask the group what we think about that. Let us assume for a moment that we agree with the paper presenters that the traditional European social democratic response is part of the problem. We are in the very depressing situation that there is no existing alternative on the table. Each of the papers seemed quite angry at the European social democratic response. But I did not read any as having a strong other road, other than some pieces of the traditional programme which might be lifted up in a new constellation. Professor Trubek suggests: let us lift up the idea of civil society and advocacy groups and promote it in some stronger way, but then it seems that the question is: what stronger way? And a question for you, David Trubek, might be: let us take the Tobin tax, could we imagine the Tobin tax implemented by cities, by towns, and by professional associations? Is there any way to imagine slowing the gears of capital flight other than through Malaysian-style national regulation? How do we imagine lifting up this element of civil society and giving it a stronger relevance?

Another idea which I read from both Professor Thomas and Professor Kapur, would be to embrace aspects of the market. If I really understood you, I heard you to be saying legalize drugs and sex trafficking. A regulated market would be a more humane response than criminalization. How should the left think about situations in which we would want to embrace some forms of a regulated market and lift them up in particular contexts as the less repressive alternative? It is an interesting idea. I think the question for you both would be: when? In the narrow area of trafficking I can understand that this might provide us with something, because it attacks so strongly the idea of borders and it has a role in opening up the broader problem of migration on analogy to the free flow of capital. This seems to have some analytic appeal, so maybe there is a way in which we could generalize from the instance of trafficking to identify other places where a regulated market idea can be lifted up and be part of our post-European social democratic alternative.

The third proposal I heard was exactly the one Professor Cass mentioned: hybrid organizations and constitutional fluidity, let us raise them up, and rethink the institutional backdrop for global commerce. So the challenge here would be to say:

if flexibility about institutional form is going to be part of our new left agenda, can we identify particular sorts of cases in which particular kinds of alternative corporate forms or alternative transactional forms might be more part of the solution than part of the problem? I guess that for me the overall problem we are faced with over these two days is: what do we do with our disappointment about the conventional European social democratic response to unilateralism? As an American who feels in one way or another involved in a project of critique of my own country's unilateralism, I would like to believe that I could reach out to a stronger alliance with the European social democratic tradition. Yet I share a lot of the doubts that were expressed by the panel, and I share the feeling that we are only at the very beginning of figuring out which pieces of that can be effectively put back on the table.

Rotter. Somehow it seems to boil down to the question of revolution or evolution. The narrowest definition of revolution as we may know is the break-up of the existing constitution of order, be it on a states level or be it on the level of international systems. The point I was trying to make is that the international legal system is under attack from both sides. Say, for example, that the United States puts forward the proposition that the traditional notion of Article 55 of United Nations Charter (self-defence) is outdated, that we no longer need self-defence in the sense of Article 51: what we need is pre-emptive self-defence. Now everyone dealing with law knows that there cannot be a model of pre-emptive self-defence in a legal system. That is the end of any legal system.

You all know the riot the United States has created over the International Criminal Court – without any need, because my colleagues in Washington need only to have looked into the statute of the International Criminal Court. If you read it, and you do not have to do so particularly carefully, you will find that the jurisdiction of the International Criminal Court is only meant to be subsidiary to national jurisdiction. Thus if the United States were to say that it does not want the International Criminal Court to have jurisdiction over US personnel working outside the United States, we do it on our own, the case would not have arisen. And if we look at the legal situation in Bosnia and Herzegovina we know that the United Nations including the US personnel working in Bosnia is completely exempt from Bosnian jurisdiction. The point is that we witness states, the United States, but not alone, that try to get rid of legal arguments without trying to explain what are they really up to. They simply said that is our case and everyone that is able to use the Internet could have found out within a couple of minutes that the position was absolutely ridiculous. But what is behind? Behind is the attack on the international system as such and thus attacking the basis of construing new policies. What I mean, Mr Frankenberg, is, take the international law as it is. So to say: the instruments are here, the instruments are at our hands.

Trubek. In response to Prof. Cass: you asked how different would it be to the present situation. Not so different, but very different. Not so different in that there is a reality of pluralism, but a unity of discourse in authoritative circles, and that discourse reinforces and is reinforced by real institutional actions, barriers, allocation of resources, rules and so on. So while there is a discourse that seems on the surface

to favour pluralism and there is a reality of pluralism in part because no discourse and no hegemonic system is truly all encompassing, there is a tilt in a certain direction that comes from a vision which while promising a diversity actually leads to uniformity. I think there are two dichotomies on the table that I wanted to question. One was revolution versus reform, a distinction that seems to me no longer of much value, everything is sort of in the middle. Professor Frankenberg's idea, it is not only law with no politics or politics with no law, but some complicated mixture of law and politics. You do not pretend that law alone is all-powerful; you do not pretend that law is meaningless and you move ahead. So get past those two dichotomies, that is, between law and politics as separate spheres, get past reform versus revolution, pick of the shards of the past and try to make it into a vision for the future.

Susan Marks. I would like to take up Professor Kennedy's question: what do we do with our disappointment about the social democratic project? It made me think of something a British Marxist theorist, Terry Eagleton, once wrote about the position of Marxists generally. He said, rather than turning their backs on the great modern ideals of freedom and equality, Marxists should adopt the position of the 'faux naïf', and ask why it is that those ideals never seem to enter upon material reality. In other words, they should insist that the ideals be made more real than current understandings or conceptualizations allow. The reason I mention this is that what I heard from these wonderful presentations we had earlier this morning was that current understandings of the social democratic project do not have to exhaust our understanding of what that project has to offer. It contains untapped emancipatory potential, as the history of struggles in the political arena and in law indeed confirms. Feminists, for example, did not throw out the idea of equality; they did not say 'we should not be reposing our hopes in that concept'. Instead, they worked to reappropriate the concept for emancipatory ends. They made it mean more than people had hitherto wanted it to mean; they exposed the limitations of earlier understandings. This is another way of putting Professor Trubek's point: what we do with our disappointment is that we try to recuperate the shards of what is already there.

Frankenberg. I want to enrich David's question: what can be salvaged from this social democratic vision in the centre? We have to make an assessment of who is being excluded by new transnational treaty regimes such as the WTO and others, and after we have made this assessment we may then address his question as to what part of the centre may be helpful and not just create new problems. To me, it seems that we have a significant shift in international law from the instrumental to the symbolic, in so far as many conventions originally designed to help victims, even prevent victimization, now just have a symbolic meaning – they make you feel good but they don't do anything good. That is why I am not comfortable with the idea that we should just progress on this middle road hoping that this might be better than nothing. I think that we really have also to rethink this middle road.

Joel Paul. The theme of social justice has quickly been transformed into a discussion about the disparity of state power and institutional capacity. I think that it is interesting that there has been as much discussion about internal social justice issues. The sense of victimization from globalization is common to all states – including the

hegemonic power. In the United States we do not perceive that we are in charge of globalization. We feel ourselves disempowered by the process of globalization and the need of some who compete more effectively with imports from south-east Asia and we feel pressured by the competitive forces that the European Union represents. So there is the sense of states not being in control. When we talk about liberalization, there are two aspects to it: there is a liberalization of trade – opening our borders to certain goods and services capital, which of course implies the immobility of labour and the problems that come from that – but also there is the idea of trade liberalization being paralleled with the notion of liberalizing internal regulation – having flat taxes, moving away from redistribution efforts. So the argument made by economists that trade, for example, expands the pie for everybody, is in fact not true, but because we know that that is part of the liberalization effort to expand that pie, we also undertake efforts to make sure that the pie does not get distributed at all. There is therefore a way in which that liberalization is defeating its own justification. And I think somehow that the way out of this trap of liberalization comes with the notion of wanting to reconceptualize liberalization, so that it is understood not as something that happens to us out there, something external to us, but as something embedded in the state itself. That is to see globalization not as external force, not to see us as a victim of globalization, but to see us as an instrument of globalization, as something that we undertake to do. And liberalization is as much a policy, as much an act of state regulation, as is any other form of economic regulation. It is a choice we make and how we shape that choice is up to us.

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